IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, a Corporation,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Record (R. 903)* and is reported at 348 F.2d 682.

* The record printed for use in the Court below has been utilized by agreement of the parties. It consists of 3 volumes. Volumes I and II contain the transcript and the pages are numbered consecutively. Volume III contains Exhibit material and is independently paginated. References to Volumes I and II will be (R.); and references to Volume III will be (Ex.R.).

The Judgment of the Court of Appeals is at R. 911. The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are printed at R. 180 and are unofficially reported at 57 LRRM 2618. The preliminary injunction appealed by the Petitioner herein, Florida East Coast Railway Company (hereinafter "F.E.C." or "Railway") and by the United States (Petitioner in No. 782, O.T. 1965, which is consolidated for argument with the instant case and with No. 750, O.T. 1965) is at R. 189, and the Order of the United States District Court for the Middle District of Florida, denying in part and granting in part proposed employment practices is at R. 223.

A related opinion of the United States Court of Appeals (hereinafter referred to as the *Trainmen* case) is not printed in the record herein but is reported as *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, 336 F.2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965), and is printed as Appendix C to the petition for certiorari of the United States in No. 782.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1965 (R. 911). By orders entered on October 15, 1965 (R. 912) and November 18, 1965 (R. 913), Mr. Justice Black extended the time in which to file a petition for a writ of certiorari to and including November 29, 1965. The petition for a writ of certiorari was filed on November 29, 1965 and was granted on January 24, 1966 (R. 915). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented in this case are:

(1) While railroad labor organizations were engaged in a strike against a railroad after all procedures established by the Railway Labor Act had been exhausted by all parties concerned, did the Railway Labor Act compel the railroad to comply with collective bargaining agreements with the striking labor organizations in limitation of the right of the railroad to resort to self-help?

(2) Inasmuch as the National Railroad Adjustment Board was established by the Railway Labor Act as the forum for the adjudication of disputes arising out of the interpretation or application of collective bargaining agreements, did the courts below have jurisdiction (a) to require that the Railway comply with such agreements during the strike period, and (b) to determine disputes concerning the interpretation or application of such collective bargaining agreements?

(3) Does the United States of America have standing under the Railway Labor Act to obtain an injunction against a railroad when it does not allege the existence of any actual interference with, or obstruction to, interstate commerce and alleges no extraordinary circumstances which would justify injecting itself into the controversy?

Question (1) is essentially the same question as that presented by the Petition of the United States in No. 782. The difference is that, as phrased in the United States' petition, the question omits two crucial facts, *viz:* (1) that all parties concerned had exhausted all procedures established by the Railway Labor Act prior to the strike; and (2) that because of the strike it was

impossible for F.E.C. to maintain work rules and conditions which were set forth in collective bargaining agreements if it were to commence operations.

Thus, the basic issue posed is whether a struck carrier has the right to operate when it can operate only by deviating from collective bargaining agreements with the striking unions.

STATUTE INVOLVED

The Railway Labor Act, 45 U.S.C. §§ 151-163.

The text of the Railway Labor Act, Section 2. (1), (4), (5), First, and Seventh; Section 3. First (i); Section 5. First; and Section 6., being lengthy, is set out in the Appendix hereto.

STATEMENT OF THE CASE

This case arose out of demands made in 1961 upon F.E.C. by eleven cooperating labor organizations[1] (hereinafter called the "non-ops"), whose members were employed by F.E.C. (R. 181) (these unions are the petitioners in No. 750, O.T. 1965). All of the procedures established by the Railway Labor Act were exhausted by all parties, and, failing agreement, the members of the non-ops went out on strike. All other unions and all other non-supervisory and non-exempt employees honored the picket lines, as a result of which the F.E.C. was forced to cease operations (R. 394-96). Because it had no employees, except supervisors and exempt employees (hereafter referred to collectively as "supervisors"), F.E.C., when it resumed service on February 3, 1963, used supervisory and exempt employees to operate its trains (R. 353,

[1] These unions represent the so-called non-operating crafts—clerks, machinists, etc.

359). As a common carrier, the Railway had a duty to the public to provide service and F.E.C.'s purpose in resuming service was to fulfill their obligation (R. 325, 330, 382, 394). Without using supervisors, the first train could never have been operated, and their continued work as the Railway hired and trained new employees was essential (R. 204-08, 211-13, 359, 382, 384, 390, 394-95).

The United States challenges the Court of Appeals' holding that F.E.C. could—after obtaining the approval of the District Court—institute employment practices necessary to permit it to operate under strike conditions. The United States' position here is that the Railway Labor Act permits a struck carrier to operate only if it operates in strict and absolute compliance with all collective bargaining agreements, and that no "exceptions" are permissible unless, with respect to the strike-required "exceptions", the procedures of the Railway Labor Act are first exhausted. F.E.C., on the other hand, takes the position that the carrier's right of self-help in a strike situation is not an "exception", but clearly is within the contemplation of the Railway Labor Act, which does not apply to the temporary practices instituted during the period in which self-help may lawfully be employed.

Except for the strike which deprived it of the requisite trained personnel, F.E.C. would have continued to operate under the very same collective bargaining agreements from which the United States now says it may not depart. In short, the case involves a situation where an injunction was sought to compel compliance with agreements which F.E.C. was willing but unable to honor because of the refusal of its employees to work under those agreements. Thus, the Railway is in the strange position of being sued to enforce

agreements with which it was willing to comply and to reinstate working conditions which it did not voluntarily change, and which could not be duplicated under strike conditions.

Background

On September 1, 1961, the non-ops served a Section 6 notice demanding a wage increase of 25¢ per hour from F.E.C. and a requirement of six months advance notice from the Carrier prior to laying off or abolishing the positions of employees (R. 17-18, 181, Ex.R. 495-97).[2] Offers made by F.E.C. to settle the dispute were not accepted by the non-ops[3] and mediation by the National Mediation Board (hereafter NMB) did not result in a resolution of the dispute. The NMB's proffer of arbitration was refused by the non-ops and the NMB refused to recommend the creation of an emergency board (R. 18, 181, Ex.R. 457). Accordingly, the non-ops and their members went out on strike on January 23, 1963.

As stated, other labor organizations not involved in the dispute (i.e., the so-called operating unions, as well as some other non-operating unions) honored the strik-

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[2] The same wage demands were made against virtually all of the Class I carriers in the United States. Bargaining on a national basis, to which F.E.C. was never a party, resulted in settlement of the dispute in most cases.

[3] F.E.C. made a whole series of offers most of which involved hourly wage increases of more than the 10.28¢ per hour increase involved in the national settlement (see e.g., R. 339, Ex. R. 458, 477 and n. 6). At the time of the wage demand F.E.C. had suffered an extraordinary decline in its revenues as a result of the loss of traffic to and from Cuba and other traffic, and had been unable to meet fixed charges out of operating revenues for a number of years (Ex. R. 477-78). It sought, accordingly, to defer a portion of wage increase beyond 1962.

ing organizations' picket lines and F.E.C. ceased all operations. Thereafter, F.E.C. commenced trying to go back into operations.

The strike compelled the use of whatever manpower and skills were available, mostly from sources other than the membership of the labor organizations representing F.E.C. employees. As a result, various classes of work had to be consolidated and new personnel had to be trained. In the circumstances, rates of pay differed somewhat from the rates set forth in the agreements (R. 288, 293, 294, 354-59) in the sense that they were converted to a salary basis. In general, the rates paid were not less than the rates under the agreements (R. 357-58). The primary difference was that, because of the shortage of manpower, employees had to be worked across craft lines and seniority districts, and supervisors had to perform some of the work which would ordinarily have been performed by one or another of the crafts (R. 328-30, 359). Because of the lack of manpower, the F.E.C. could not, in resuming operations, comply with the collective bargaining agreements in effect before the strike.

In spite of a vigorous hiring program, it proved difficult for the Railway to obtain trained employees due to the strike. The Railway was compelled to hire relatively unskilled personnel to do skilled jobs, which necessitated lengthy on-the-job training of said employees by supervisory personnel, use of supervisory or exempt personnel to do the necessary work in the interim, and use of employees across craft lines (R. 661-62, 666-67, 672-74, 685-87, 702, 712-14, 723-24, 744, 753, 761-64, 775-86). This shortage of skilled personnel has persisted up to the present time.

During 1963, F.E.C. took several actions:

(1) on September 1, 1963, it reduced to writing the temporary practices which had grown up under strike conditions in a document entitled "Conditions of Employment" which was distributed to all employees and which was intended to be a guide to temporary conditions prevailing during the strike period (R. 288-302);

(2) on July 31, 1963, it issued a Section 6 Notice to eighteen labor organizations proposing cancellation of existing union shop agreements. The labor organizations, including the non-ops, refused to negotiate on August 29, 1963, and on September 9, 1963, F.E.C. notified the organizations that it was cancelling the union shop agreements because they had refused to negotiate (Ex.R. 381-84);

(3) on September 24, 1963, it issued a Section 6 Notice proposing adoption of a "Uniform Working Agreement" as an amendment to existing collective bargaining agreements (Ex.R. 36, *et seq.*). When the non-ops again refused to bargain or to confer with respect to this notice because of the presence of a court reporter, F.E.C. on October 30, 1963, attempted to put this notice into effect (Ex.R. 442, *et seq.*).

In the instant case, the District Court enjoined the implementation of the two notices (items (2) and (3) above) by F.E.C. *These two notices, which involved proposed permanent changes in the agreements, are no longer involved in this case and their propriety is not at issue before this Court.* The formalization of "Conditions of Employment" (item (1) above) was never intended as a change in the agreements, but

rather to reflect temporary conditions during the strike (R. 288-302).

Notwithstanding continuation of the strike, the District Court, with minor exceptions, ordered F.E.C. to comply fully with all collective bargaining agreements. This is the action which the Court of Appeals affirmed and which F.E.C. contests.

The Trainmen Case

Prior to the decision of the District Court in this case, the United States Court of Appeals for the Fifth Circuit, on August 18, 1964, decided the *Trainmen* case (*Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*), 336 F.2d 172 (5th Cir. 1964), *cert. denied,* 379 U.S. 990 (1965). This decision has a bearing on the instant case. The *Trainmen* case involved, in part, the 1959 notice which was litigated in *Brotherhood of Locomotive Engineers et al.* v. *Baltimore & Ohio Railroad Co. et al.,* 372 U.S. 284 (1963) (hereafter the *B&O* case), and the full background of the 1959 rules dispute is set forth in that opinion and in the *Trainmen* opinion. With respect to the right of F.E.C. to operate during a strike, the Court of Appeals held:

> "Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration. . . .
>
> "Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R., 1957, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or

puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.

"To be sure, the law gives much power to organized labor. It discourages, on every hand, industrial and railroad labor strife, walkouts, lockouts, and strikes. But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." (336 F.2d at 181)

Concluding, the Court of Appeals held that F.E.C. was,

". . . free to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions" (336 F.2d at 182)

The United States Case

This case began on April 30, 1964, when the United States filed suit against F.E.C., alleging that F.E.C. had violated Section 2, Seventh, and Section 6 of the Railway Labor Act. In essence, the complaint was that actions taken by the Railway immediately following the strike (e.g., the use of supervisory and exempt personnel) in its efforts to get back into operation were a violation of the Act. The position of the United States, insofar as is now material, was that such emergency operations constituted a unilateral change in the existing collective bargaining agreements without compliance with the statutory procedures, and that no deviation from the method of operations set forth in the agreements was permissible,

notwithstanding a strike.[4] F.E.C. took the position that during the strike the agreements were inoperative. It contended that it had the right, in self-help, to employ any peaceful means at its disposal in order to operate, and that the Railway Labor Act does not restrict a carrier subjected to a strike in the means used to operate under strike conditions (R. 100-103).

The courts below did not accept the contention of either party. In the preliminary injunction granted on October 30, 1964, F.E.C. was directed, *inter alia,* to reinstate and maintain the rates of pay, rules and working conditions contained in the collective bargaining agreements with the unions (R. 191). These agreements were thus held not to have been suspended by the strike. Further, the District Court provided that F.E.C. was enjoined from making any changes in employment conditions without *prior* permission of the Court, but was authorized to make application to the Court for permission to deviate from employment conditions specified by the agreements where necessary to enable F.E.C. to operate under strike conditions (R. 190-91). F.E.C. applied for permission to adopt certain employment practices (R. 216). This application was granted in part and denied in part on December 3, 1964 (R. 223). Although most of its requests were denied, F.E.C. was permitted to exceed the ratio of apprentices to journeymen set forth in the agreements, to contract out certain work, to use supervisory personnel to perform certain tasks for specified periods in which properly trained personnel were unavailable, and to use supervisory or contract personnel as bridge tenders as a matter of security (R. 223-25).

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[4] The complaint had numerous other allegations which are no longer material (R. 2, *et seq.*).

On appeal the United States contended that regardless of the strike and the impossibility of full compliance with the agreements, F.E.C. was nevertheless required to comply therewith because the Railway Labor Act forbids even temporary changes until the notice, bargaining and mediation procedures of the Act are exhausted. F.E.C. appealed, contending that during the strike the agreements had no force and that it could take any and all steps necessary to operate without advance court approval. It maintained that once Railway Labor Act procedures have been exhausted and there is a strike, the railroad is free to employ whatever means are at its disposal to operate. F.E.C. also contended that even assuming that the agreements remained in effect during the strike, exclusive, primary jurisdiction over claims of violation of agreements was in the National Railroad Adjustment Board.

SUMMARY OF ARGUMENT

The F.E.C. as a common carrier had a duty to provide service to the public even in the face of a strike, and it was not compelled or required during the period of the strike to operate in accordance with the working conditions, etc. set forth in collective bargaining agreements with the labor organizations representing its various employees. The temporary practices adopted by F.E.C. in response to the changed conditions created by the strike were not intended to be, and were not in fact, changes in the existing agreements requiring notice, bargaining or mediation, but were merely the only means available to F.E.C. to implement its right to try to operate.

In any event, the agreements with the labor organizations were suspended during the period of the strike

and F.E.C. was not required even to attempt to comply with them. After the procedures of the Railway Labor Act have been exhausted by all parties concerned and a strike has been called, the Act's procedures are inapplicable to temporary changes in operating practices adopted in response to strike conditions. The Act certainly does not compel compliance with collective bargaining agreements so long as the other parties refuse to perform as agreed.

The courts do not have jurisdiction to adjudicate disputes arising out of the interpretation and application of collective bargaining agreements. Exclusive, primary jurisdiction of such matters has been vested by the Railway Labor Act in the National Railroad Adjustment Board. Therefore, even if the Court below had jurisdiction to hold that agreements are not suspended during a strike (which F.E.C. denies), it was error for the Court to decree specific enforcement of the contracts and to empower the District Court to hear and determine matters of contract interpretation and application. The power thus granted to the District Court has its warrant neither in the Railway Labor Act nor in general equitable principles, and is totally without basis in law.

The United States has no standing to sue a carrier to require compliance with collective bargaining agreements during a strike where, as here, the flow of commerce was not interrupted. The Railway Labor Act does not provide for such a suit and no extraordinary circumstances entitle the United States to meddle in such a labor dispute.

ARGUMENT

POINT I

DURING A STRIKE CALLED BY RAILROAD LABOR ORGANIZATIONS AFTER EXHAUSTION OF RAILWAY LABOR ACT PROCEDURES, IN THE EXERCISE OF SELF-HELP A CARRIER IS FREE TO UTILIZE THE MANPOWER AND THE MEANS AT ITS DISPOSAL AND TO VARY FROM CONDITIONS EMBODIED IN COLLECTIVE BARGAINING AGREEMENTS IN ORDER TO OPERATE.

Prior to January 23, 1963, when the non-ops struck, F.E.C. regularly employed about 2,000 non-supervisory employees (R. 182) who were represented by 21 different labor organizations. Because all employees refused to cross picket lines, the strike by the non-ops on January 23, 1963, reduced F.E.C.'s complement of non-supervisory personnel to zero and F.E.C. ceased operations entirely. On February 3, 1963, F.E.C. in order to provide service to the public began to resume freight operations in a very limited manner using supervisors. In so doing, F.E.C. was following a practice which railroads faced with strike or other emergency conditions have followed without question for at least forty years.

No one contests the complete impossibility of hiring and training the necessary replacements. Indeed, as the courts below found, the labor shortage has continued to exist to a degree years after the strike began. See e.g., order of December 3, 1964, approving temporary employment practices (R. 223), which as modified is still in effect. We do not understand the United States to deny either the original or the continued impossibility of full compliance with the agreements. Rather, the United States' position is that after initiation of the strike, F.E.C. was not permitted under the Railway Labor Act to use supervisory personnel to get back into operation; that F.E.C. was compelled to

choose between yielding to all of the unions' demands or going out of business until it had recruited the number of trained skilled [5] employees sufficient to render compliance with every provision of the agreements possible.

Following this Court's decision in the *B&O* case, *supra,* the courts below acknowledged that the Railway Labor Act did not deprive the F.E.C. of the right to employ self-help. While F.E.C. contends that the courts below improperly restricted that right, the United States' contention is that it does not exist!

Accepting the United States' position literally would present an appalling situation. Even now, more than three years after the strike began, F.E.C. still would not have commenced operations unless in the meantime it had capitulated to the union demands. It would mean that, in the face of a refusal of its employees to report for work, any railroad carrier would be powerless to act.

The position of the United States is erroneous for at least three reasons. First, the claim of the United States necessarily denies the carrier the right of self-help during a strike, a right which this Court held was not taken away by the Railway Labor Act. Second, the provisions of the Railway Labor Act and its legislative history confirm that the Act does not impose restrictions upon the exercise of the right of self-help. Third, the collective bargaining agreements, the effec-

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[5] The required experience under the agreements for many of the skilled craftsmen is four years (R. 197, 750, 797-98). If such persons already trained are not available, F.E.C. must train the employees it has, on the job, and this presupposes its operating which the United States would halt.

tiveness of which during a strike is a fundamental premise of the Government's position, are in fact suspended and the carrier is free to proceed in the exercise of its right to self-help without reference thereto.

A. Following Exhaustion of the Procedures of the Railway Labor Act and Failure to Resolve the Dispute, the Parties Are Free To Utilize Self-Help.

In the *Trainmen* case, *supra*, the Court below relied upon this Court's decision in the *B&O* case and correctly stated that the Railway Labor Act permits both sides to a "major dispute" to resort to self-help once the Act's procedures have been exhausted:

> ". . . There is an actual strike against FEC by the non-operating Unions. The continuation of the strike by such employees is legal. So, too, is the effort of FEC to operate. But as a result of this strike, BRT declines to supply the craft workers as its contract calls for. So far as FEC's need for these crafts and BRT's failure to supply them, *there is no requirement or provision, for this impasse being resolved under the machinery of the Railway Labor Act. Nothing in the Act forces either compulsory arbitration or acquiescence. At that juncture, what the Act recognizes is that each party is free lawfully to employ self-help.*[6] The Supreme Court in this very controversy made that plain. In its decision of March 4, 1963, it stated:
>
> > '. . . What is clear . . . is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute . . . .' " (336 F.2d at 180-81)

The United States, admitting that F.E.C. could not operate in compliance with the various agreements,

[6] Emphasis is supplied throughout unless otherwise indicated.

contends that before F.E.C. could attempt to operate after initiation of the strike by deviating from them in any way, was required to give notice, bargain and otherwise re-exhaust the procedures of the Railway Labor Act as to every temporary expedient required.[7] The labor organizations involved would not have consented to the emergency actions of F.E.C. in attempting to operate. Nevertheless, under the United States' theory, F.E.C., out of operation, lacking 2,000 employees necessary to fulfill the commitments of its collective bargaining agreements, should be required to re-exhaust all of the Railway Labor Act procedures, including mediation, seeking the consent to emergency working conditions of the very people who created the emergency by refusing to work in the first place! All will agree that in the circumstances which existed at the time of the strike and which continue to exist, such a course of action would have been futile and absurd.

The employers' right of self-help under the Railway Labor Act and the freedom of action it affords the carrier after that right matures has been confirmed by the courts. Thus, in *Pan American World Airways, Inc.* v. *Flight Engineers' International Ass'n, PAA Chapter*, 306 F.2d 840 (2d Cir. 1962), the Court upheld the right of the carrier unilaterally to take action during the strike in the exercise of its right of self-help:

> "When the cooling-off procedures of the Act, including the appointment and report of the Emergency Board, if resort is had to that procedure, are exhausted and the final thirty day period has

[7] The strike began because the unions wanted to change the existing agreements. The present litigation against F.E.C. instituted by the United States, is for the purpose of maintaining in effect the agreements which at the time of the strike F.E.C. did not wish changed.

> elapsed *it is quite clear that the Act contemplates that further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention. The parties are then free from all compulsion under the Act and may resort to 'self help'.* . . . The whole scheme of the Act is cast in terms of compulsory settlement of minor disputes and assistance through mediation (together with some resort, by appointment of Emergency Board, to the instruments of public pressure) in the *voluntary* [emphasis by the Court] settlement of major disputes, with a fixed cut-off date for the termination of such assistance, *and the relegation thereafter of the parties to the use of their economic weapons.*" (306 F.2d at 846)

This same philosophy prevailed in *Flight Engineers* v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y. 1962), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *Flight Engineers* v. *Eastern Air Lines*, ... F. Supp. ...., 51 LRRM 2105 (S.D.N.Y. 1962), *aff'd*, 311 F.2d 745 (2d Cir. 1963), *cert. denied*, 373 U.S. 924 (1963); *Flight Engineers* v. *Eastern Air Lines*, 243 F. Supp. 701, 707, (S.D.N.Y. 1965) (pending on appeal).[8] See also, *Flight Engineers* v. *CAB*, 332 F. 2d

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[8] Flight Engineers (FEIA) was the authorized representative of the class or craft of flight engineers employed by Eastern and had a collective bargaining agreement. In 1960, FEIA served a Section 6 Notice of desire to change the agreement and Eastern served a Section 6 counterproposal. Negotiation, mediation and Presidental Emergency Board failed to bring about settlement and FEIA struck on June 23, 1962. Eastern at first ceased operations but in mid-July, 1962, resumed operations using pilots trained as engineers and returnee engineers, all pursuant to a new agreement with Air Line Pilots Association (ALPA). Action of Eastern held permissible exercise of self-help after exhaustion of procedures of the Act.

312 (D.C. Cir. 1964);[9] *Flight Engineers* v. *NMB*, 230 F. Supp. 611 (D.D.C. 1964), *aff'd*, 338 F.2d 280 (D.C. Cir. 1964).[10]

The Act's procedures are designed to maintain the flow of commerce while disputes concerning permanent changes in agreements relating to wages, rules, etc. are negotiated and mediated. As this Court stated in *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 725 (1945), with respect to major disputes:

> ". . . For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. Section 5, First (b). *But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.*"

And, as has already been noted, this Court's decision in the *B&O* case squarely determines that a carrier

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[9] FEIA filed a complaint with CAB claiming that Eastern had violated the Federal Aviation Act by virtue of its violation of the Railway Labor Act. Included were charges that Eastern bargained with individual engineers, negotiated with ALPA when legally obligated to bargain only with FEIA as to engineers, bad faith, etc. CAB dismissed the complaint. The Court of Appeals affirmed.

[10] Action by FEIA to enjoin a representation election being conducted by NMB in 1964. As the result of this election ALPA was certified (in 1964) as the representative of Eastern's Flight Engineers.

has the right to engage in self-help when the statutory procedures are exhausted (372 U.S. at 291).

In its assault upon the doctrine of employer self-help under the Railway Labor Act, the United States attempts to make it appear that the Act, unlike any other labor legislation ever passed by Congress, was intended to permit labor organizations to strike while hamstringing struck employers. The Court is asked by the United States to hold that a carrier, unlike any other employer in the nation, was intended to be compelled either to surrender to union demands or to cease operations by reason of a strike.

In decision after decision, this Court has upheld the doctrine of *mutual* self-help following exhaustion of statutory procedures. As the Court stated in *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960):

> "... The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side .... (361 U.S. at 489)

> ". . . There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law." (361 U.S. at 495)

See also *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); and recent decisions of the Court holding in various factual settings that a strike or other impasse permits the "legitimate use of any economic weapon by an employer": *NLRB* v. *Brown*, 380 U.S. 278, 286 (1965); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965) and *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). Every court faced with this question has reached a like conclusion. For example, in *NLRB* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir. 1964), the Court, faced with the problem of a struck newspaper which contracted out work, stated:

> ". . . It would be a startling doctrine indeed if this court were to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction." (331 F.2d at 213)

To the same effect see *Hawaii Meat Co.* v. *NLRB*, 321 F.2d 397 (9th Cir. 1963).

Because it denies the existence of the railway's right to employ self-help, a right which this Court and every other court which has examined the question has confirmed, the contention of the United States herein should be decisively rejected.

B. During a Strike, the Railway Labor Act Does Not Impose Any Restrictions Upon Carrier's Use of Self-Help.

No provision of the Railway Labor Act mentions a strike. No hint is given that there are any statutory restrictions upon the use of self-help during a strike. No provision of the Act sets forth any restrictions to govern the activities of the employers or the labor organizations engaged in the strike. The silence of the Act in these respects was deliberate; it was never intended that the mediation and conciliation provisions of the Act having been once exhausted by the parties, were thereafter to be used to render either party's right of self-help nugatory. The Act thus recognizes the futility of re-mediation of a dispute once the voluntary system prescribed therein has failed to produce agreement.

The entire argument to the contrary rests upon the United States' interpretation of the language of Section 2, Seventh of the Act (45 U.S.C. §152, Seventh) which states:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."[11]

The United States would have Congress, by enacting this language in 1934, read as intending to prevent railroads from operating during a strike unless, by complete replacement of an entire work force, they are

[11] This provision replaced former Section 2, Fifth of the 1926 Act (44 Stat. 578 (1926)). The change in statutory wording had no effect whatsoever upon the basic statutory scheme. See, H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2 (1934).

able to comply with all agreements with all organizations (or, alternatively, unless they first process all proposed temporary changes in operations, made necessary by the strike through the full panoply of Section 6 procedures). The United States' interpretation of the foregoing language is at war with the history of the statute and its first general purpose—

> " . . . (1) To avoid any interruption to commerce or to the operation of any carriers engaged therein . . . ." (45 U.S.C. § 151a(1))

The Act thus expressly recognizes that there is a greater public interest than the private interests of the antagonists in a labor dispute. That public interest is the continued flow of commerce.

As previously pointed out, the statutory language does not require the result the United States seeks or the limitation on F.E.C.'s rights which the courts below thought necessary. Section 2, Seventh in terms is a prohibition against a carrier *initiating changes* in conditions. It has no reference whatever to what a carrier can do when the conditions set forth in agreements were *already changed* by the unions when they struck. Moreover, temporary practices necessary to rectify the lack of manpower resulting from a strike do not themselves involve a "change . . . in agreements" as the phrase used in Section 2, Seventh of the Act specifies. Rather, such temporary practices are the essence of the right of self-help which comes into being once the procedures of the Act have been exhausted.

The theory of the Act, amply demonstrated by the testimony and debates which preceded its passage, was that its provisions would tend to stave off strikes

and interruptions of commerce; *and, that if its provisions did not accomplish this result, Congress might have to enact further legislation.* This view was voiced by the Committee Reports accompanying the bill; for example, the Report of the Senate Committee on Interstate Commerce advocated a "fair trial of the method of amicable adjustment agreed upon by the parties . . ." and continued:

> ". . . If the plan proposed by the parties does not work, it will then be proper to consider what other methods are essential to protect the public interest in adequate and uninterrupted transportation." (S. Rep. No. 222, 69th Cong., 1st Sess. 4 (1926))

The debate in Congress was to the same effect, the advocates of the bill prohesying, in the words of Senator Watson, Chairman of the Senate Committee on Interstate Commerce,

> ". . . that if this plan shall be adopted, no railroad labor strike will occur in the United States . . ." (67 Cong. Rec. 8819 (1926))

and other Congressmen, less sanguine, stating that if a "voluntary" plan did not work, Congress could easily remedy this by enacting a "compulsory" plan (67 Cong. Rec. 8896 (Senator Fess), 4570 (Congressman Rayburn), 4659 (Congressman Hawes), 4675 (Congressman Parker).

Thus, while it was hoped by Congress that the Act would put an end to all railroad strikes, it was understood that, under the plan of the Act, there was a point at which the compulsion of the Act ceased to be operative. After compliance with the Act, *both unions and*

employers were free of its restrictions to resort to self-help. As Congressman Crosser stated in debate:

> "If the emergency board fails to settle the dispute, *the railroads and the men,* if they are willing, may bring the dispute before a board of arbitration, *but they are not compelled to do so.*" (67 Cong. Rec. 4665 (1926))

The question before the Court here, is whether the Act created the restriction that a carrier must comply during strikes with all collective bargaining agreements, which the striking unions refused to perform, unless first excused from compliance by a court order.

In *Pan American World Airways, Inc.* v. *Flight Engineers' International Ass'n, PAA Chapter,* quoted *supra,* the Second Circuit answered the question this way:

> ". . . it is quite clear that the Act [the Railway Labor Act] contemplates that further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention." (306 F.2d at 846)

Judge Feinberg in one of the *Flight Engineers* cases, *supra,* 208 F. Supp at 190, had this to say in answer to the question:

> ". . . To allow a union but not an employer 'self-help' . . . is a possible but unattractive result, which stacks the deck heavily in favor of one of the parties to a labor dispute after a strike has started. I do not believe such a result is required by the Act."

No attempt was made to support, by reference to the statute or otherwise, the restrictions imposed on

F.E.C.'s use of self-help.[12] The decisions just quoted admit of no such limitations on F.E.C.'s right of self-help. It is submitted that there is no warrant in the Act for the one-sided restrictions imposed by the courts below.

Thus, the courts have held and the legislative history makes clear that the Railway Labor Act was never intended to prescribe rules of conduct for the parties to a labor dispute after the procedures for voluntary settlement were complied with and a strike had occurred. The Act simply does not cover the situation or compel action or non-action by either side during the strike.[13]

The Court is respectfully urged to reverse the decision of the Court below and to vindicate the right of F.E.C. during the strike to operate free of the necessity of compliance with its agreements with the striking labor organizations. Unless, contrary to all other Federal labor legislation, the Railway Labor Act was intended to place carriers at a fatal disadvantage as against the unions, a thesis which cannot be justified, no warrant for the one-sided limitations of the courts below on the employment of self-help by F.E.C. can be found.

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[12] In the *Trainmen* case the Court of Appeals merely said: "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." (336 F.2d at 181)

[13] This is not to say that the Act ceased to have any effect at all. F.E.C. concedes that *permanent* changes in agreements could not be made outside of the method specified by the Act, and that upon the cessation of the strike the force and effect of the agreements would be fully reinstated.

It should be remembered that the entire relief sought against F.E.C. in any of the litigation involved in this long dispute could have been obtained instantly by the unions calling off the strike. This would have compelled F.E.C. to revert completely to the working conditions embodied in the agreements as to which specific enforcement has been sought and required.

It is respectfully submitted that the Court should not sanction the attempt by the courts below and by the United States to buttress the economic position of the unions by restricting the F.E.C.'s right to employ self-help. See *American Ship Building Co.* v. *NLRB, supra,* 380 U.S. at 315-18.

C. The Courts Below Erred In Holding In Effect That the Collective Bargaining Agreements Were Enforceable Against F.E.C. During the Strike.

If, as this Court held in the *B&O* case, the carrier's right of self-help exists under the Railway Labor Act, the collective bargaining agreements with the striking unions must be temporarily suspended. Illogically, the courts below held that the right of self-help exists, but that these agreements were not suspended by the strike. They were, the courts below said, to be complied with *insofar as the F.E.C. was concerned, but of no effect insofar as the unions were concerned.* Only where it was completely impossible for F.E.C. to perform (although the F.E.C.'s performance was seriously interfered with by the unions) would the courts below even begin to relax the requirement of rigid compliance with the agreements.

F.E.C. submits that the holdings of the courts below are one-sided, lacking in all of the elements of mutuality which usually are important in a bi-lateral con-

tract, and, in final analysis, grossly unjust. Moreover, the determination below that these contracts were specifically enforceable against F.E.C., even though the union signatories had called a strike and flatly refused to honor the agreements, is extraordinarily bad law, and in conflict with every other precedent on the point.

The National Railroad Adjustment Board has consistently held that practices required by strike conditions do *not* represent the permanent "changes in rates of pay, rules or working conditions" to which Section 6 procedures are applicable under the Act, since it is the strike which "changes conditions" initially by withdrawing the labor force. The strike itself, the Board has held, opens the door to employer self-help and, although not nullifying collective bargaining agreements, places them for its duration in a state of "suspension".[14]

Although few cases involving the operation of strike-bound carriers under the Railway Labor Act have been

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[14] E.g., *Brotherhood of Railroad Trainmen and Kentucky and Indiana Terminal Railroad Company*, National Railroad Adjustment Board, First Division, Award No. 17,055 (1955); *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and Macon, Dublin & Savannah Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 10,197 (1961); *Brotherhood of Maintenance of Way Employees and St. Louis Southwestern Railway Company*, National Railroad Adjustment Board, Third Division, Award No. 5042 (1950); *Brotherhood of Maintenance of Way Employees and Missouri Pacific Railroad Company*, National Railroad Adjustment Board, Third Division, Award No. 5074 (1950); *Order of Railway Conductors and Boston and Maine Railroad*, National Railroad Adjustment Board, First Division, Award No. 13,341 (1950); *American Train Dispatchers Association and Spokane, Portland and Seattle Railway Company*, National Railroad Adjustment Board, Third Division, Award No. 9851 (1961).

decided by the courts, the cases (other than the instant case) in point hold squarely that after exhaustion of the Act's procedures, the collective bargaining agreements are not in force during a strike.

In *Flight Engineers* v. *Eastern Air Lines, supra,* 243 F. Supp. 701 (S.D.N.Y. 1965), the Flight Engineers brought an action against Eastern Air Lines and Air Line Pilots Association, claiming that certain actions of Eastern during a strike initiated by the Flight Engineers on June 23, 1962, violated the agreement between Eastern and the union. The Court replied:

> ". . . For the reasons cogently stated by Judge Feinberg and Judge Levet, *once the strike had been called and paralyzed the operations of Eastern, the agreement was no longer in force and Eastern was entitled to take unilateral action or self-help in order to restore the vital public service of its air line.* As stated by Judge Levet:
>
> > 'Based on the record before me, I find, for the same reasons as did Judge Feinberg, that as between the plaintiff [FEIA] and Eastern the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help.'" (243 F. Supp. at 707)

With regard to alleged violations of seniority rights by Eastern during the strike, the Court held:

> ". . . *Since the agreement between Eastern and FEIA was no longer in force,* Eastern was under no obligation to reemploy all the strikers. . . ." (243 F. Supp. at 708)[15]

[15] An appeal in this case is pending before the United States Court of Appeals for the Second Circuit.

This conclusion is directly supported by the other cases cited *supra* arising out of the same airline strike (pp. 18-19, *supra*).

The Fifth Circuit Court of Appeals in the *Trainmen* case noted:

> "... there is no requirement, or provision, for this impasse being resolved under the machinery of the Railway Labor Act. Nothing in the Act forces either compulsory arbitration or acquiesence. At that juncture, what the Act recognizes is that *each party* is free lawfully to employ self-help." (336 F.2d at 180)[16]

In the *Trainmen* case the union conceded that F.E.C. had the right to meet strike conditions, and a similar concession was made in this case.

> "... the BRT has recognized that where, for example, sufficient crews are not available to maintain the contract structure forbidding road crews from operating trains through terminals, this requirement need not be met. They also concede that supervisory personnel may be used and that as respects the Union Shop agreement, it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay nonunion replacements." (326 F.2d at 181)

It is to be noted that these concessions are in accordance with prior interpretation of the Railway Labor

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[16] As pointed out elsewhere, the correct inference from this proposition, which the Court of Appeals failed to draw, is that the employer may respond to strike conditions by using in its discretion, any mode of operation at its disposal. The idea that a carrier may make only changes which are "reasonably necessary" in the discretion of the District Court has no warrant in the Railway Labor Act, and the Court below erred in imposing this limitation on F.E.C.'s right to self-help during the strike.

Act, and in stark contrast to the extreme position taken by the United States.

The Court in the *Trainmen* case cited as a controlling authority this Court's unanimous decision in the *B&O* case, a decision whose mention has been assiduously avoided by the United States in prior briefs and in its petition for certiorari, since it so clearly upholds the carrier's right to self-help following exhaustion of mediation procedures under the Act. "What is clear . . ." this Court stated,

> " . . . is that *both parties,* having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of §10 providing for the creation of an Emergency Board." (372 U.S. at 291)

The inescapable conclusion is that during the period of selp-help the agreements are suspended. How else can an employer deprived of the union labor force operate? Since a strike creates economic warfare, it is absurd to tie the hands of one of the parties as the courts below have done. Common sense dictates that the agreements are suspended as the Adjustment Board and the courts have consistently held.

For forty years the Railway Labor Act has been construed by everyone as permitting a carrier to meet a strike and to carry on business it can if it so desires. The decisions of the National Railroad Adjustment Board (see n. 14, *supra.*) in a variety of situations attest to this. To imply, as did the United States in its petition for certiorari (p. 14. n. 8), that carriers have always crumbled in the face of a strike or any other emergency is erroneous. For the first time since the

Act was passed, it is contended in this case that the intent of the Act is to prevent a carrier from operating during a strike.

Even the labor organizations involved, as has been set forth, have repeatedly conceded that F.E.C. was entitled to try to operate. Indeed in this case their counsel stated (the same counsel having represented the trainmen in the *Trainmen* case) that concessions made in the *Trainmen* case were not on the basis that F.E.C. was permitted to deviate from its agreements, but rather that the agreements did not require the maintenance of contract structure when there were not enough employees to do so. It was conceded that this was equally true under the non-op contracts. Why, unless no one ever thought otherwise, would the labor organizations with the most at stake have made these concessions? The answer as this Court held in the *B&O* case is that there is a *mutual* right of self-help available to both parties to the labor dispute when the procedures of the Railway Labor Act have been exhausted. This right F.E.C. was entitled to employ.

Inasmuch as the Railway Labor Act procedures were not applicable to the situation which confronted F.E.C., for all of the Act's procedures had been exhausted; and, since the collective bargaining agreements were in fact suspended during the strike, F.E.C. was free to employ self-help without the necessity of any compliance with the agreements. It is respectfully submitted that the decision of the Court below should be reversed for the foregoing reasons.

POINT II

PRIMARY JURISDICTION OVER QUESTION OF THE INTERPRETATION AND APPLICATION OF COLLECTIVE BARGAINING AGREEMENTS (ASSUMING ARGUENDO THAT THEY REMAIN IN EFFECT DURING A STRIKE) IS VESTED IN THE NATIONAL RAILROAD ADJUSTMENT BOARD. THE ORDERS OF THE COURTS BELOW ENFORCING COLLECTIVE BARGAINING AGREEMENTS AND COMPELLING F.E.C. TO APPLY TO THE DISTRICT COURT FOR APPROVAL OF TEMPORARY OPERATING PRACTICES INVADED THE BOARD'S PRIMARY JURISDICTION AND WERE WHOLLY WITHOUT BASIS IN LAW.

Section 3. First (i) of the Railway Labor Act (45 U.S.C. § 153 First (i)) commits the resolution of certain questions to the National Railroad Adjustment Board (NRAB) as follows:

> ". . . disputes between an employee or group of employees and a carrier or carriers growing out of grievances *or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . ."

In the tens of thousands, disputes of all kinds have been adjudicated by the NRAB since its formation in 1934. Day to day operations of all railroads create frequent questions and disputes concerning the "interpretation or application of collective bargaining agreements", from disputes involving the meaning of contractual language to those concerning the employer's use of "non-scope" employees to perform "scope" work in emergency situations. Personnel shortages and contract disputes occur in the course of normal operations on all railroads and are not necessarily related to strike conditions. When such disputes arise, they are referable not to the National

Mediation Board, and not to the courts, but to the NRAB, a body with expertise in the busines of running a railroad. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 243 (1950); *Order of Railway Conductors of America* v. *Southern R. Co.*, 339 U.S. 255 (1950).

F.E.C. has contended that the courts below never had jurisdiction to determine the applicability of the agreements during the strike because questions concerning the "application" of agreements are specifically committed to the jurisdiction of the NRAB. But, passing this point here, the Court below completely usurped the statutory jurisdiction of NRAB and made no effort to "make a workable allocation of business" between the court and the agency created by Congress to determine contract questions. *CAB* v. *Modern Air Transport*, 179 F.2d 622, 625 (2d Cir. 1950); Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964). Rather, that agency was here ignored and completely by-passed.

Having determined (albeit erroneously) that the collective bargaining agreements were not suspended during the strike, the courts below exhausted their jurisdiction. All further questions concerning the agreements were committed by the Railway Labor Act to the exclusive primary jurisdiction of the NRAB. In attempting to compel specific enforcement of the agreements by injunction (R. 191), the Court acted contrary to the express command of the Act. As the Court held in *Hettenbaugh* v. *Airline Pilots Ass'n International*, 189 F.2d 319 (5th Cir. 1951):

> "The Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of col-

lective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose." (189 F.2d at 321)

The courts below clearly were without jurisdiction to decide the questions of contract interpretation and application presented by the carrier's operations during the strike period. This principle is firmly established that what a collective bargaining agreement permits a carrier to do or forbids it from doing under various circumstances is a matter within the exclusive province of the NRAB. See for example, *St. Louis, S.F. & T. Ry. Co.* v. *Railroad Yardmasters of America*, 328 F.2d 749 (5th Cir. 1964), *cert. denied*, 377 U.S. 980 (1964); *Aaxico Airlines, Inc.* v. *Air Lines Pilots Ass'n International*, 331 F.2d 433 (5th Cir. 1964), *cert. denied*, 379 U.S. 933 (1964), *rehearing denied*, 379 U.S. 985 (1965); *Elgin, J. & E. Ry. Co.*, v. *Burley*, 325 U.S. 711, 723 (1945); *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 565, 567-68 (1946), *rehearing denied*, 327 U.S. 814 (1946); *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*; *Hettenbaugh* v. *Airline Pilots Ass'n International*, *supra*.

In language which has been quoted many times, this Court, in the *Burley* case, *supra*, distinguished between cases to which Section 6 procedures are applicable ("major disputes") and those in which the courts may not act so as to deprive the NRAB of jurisdiction ("minor disputes"):

"The first [class] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether

an existing agreement controls the controversy. *They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*

> *"The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."* (325 U.S. at 723)

A certain confusion may have crept into the opinions of the courts below because of the fact that F.E.C.'s Section 6 notices of July 31 and September 24, 1963, whose implementation was enjoined by the District Court and which are no longer in issue, obviously *did* attempt to change agreements. They involved major disputes and could not be handled by the NRAB. However, the injunction issued by the District Court on October 30, 1964 went further. It enjoined F.E.C. from making *"any"* permanent *or temporary* changes in employment conditions in existing contracts without prior authorization from the Court. It was intended to and did place solely in the hands of the District Court every question of interpretation and application of *existing agreements.*

As a result of affirmance of this Order by the Court below, the District Court is required to pass judgment on the day-to-day operating procedures of the railroad during the strike, which are not intended to and which do not in any way "change" agreements. In contradiction of its own decision in *Hettenbaugh* v.

Airline Pilots Ass'n International, supra (189 F.2d at 321), wherein it stated:

> "... The federal courts are not charged by federal law with the duty of policing parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act . . .",

and in contradiction of the decision of this Court in *Order of Ry. Conductors* v. *Pitney, supra,* the Court below has transformed the District Judge into just this sort of "policeman".

Of course, the District Court cannot decide whether a "deviation" from collective bargaining agreements is "reasonably necessary" or not until it has first decided whether the operating procedures proposed by the Railway are in fact in accordance with or in violation of agreements. When the District Court undertakes to police the agreements under the guise of affecting compliance with its order to reinstate and maintain agreements, by the very act of policing the agreements it displaces the primary and exclusive statutory jurisdiction of the NRAB. Thus, the determinations by the lower court inevitably involved questions of contract interpretation and application, and the District Court time and again has played precisely the same role that the statute gives to the NRAB. For example, it has decided:

> —that the language of Rule 46(b) 7 of the collective bargaining agreement with the Trainmen requires seasonal readvertisement of yardmen's jobs, even though the same language, as interpreted by the Railway, does not require such readvertisement if the active yardmen object thereto;[17]
>
> —that the language of Article 22(b) of the Trainmen agreement prohibits promotion of train-

men to conductor where there are no trainmen eligible for promotion thereunder (although the Article is silent on the question).[17]

—that the language of Articles 22(a) and 45(b) of the same agreement prohibit separate seniority as trainmen and as yardmen (in spite of past practice under these Articles to the contrary);[18]

—that engineers were improperly disqualified for service by F.E.C.'s chief medical examiner, even though it was shown that the standard applied, namely whether the employee was physically qualified to safely and efficiently perform his duties, was the same as it had been for more than 30 years. The court held that the fact that these disputes had been processed on the property as grievances and that F.E.C. had offered to submit these disputes to a neutral doctor for resolution was immaterial;[19]

—that conductors were improperly disqualified for service by F.E.C.'s chief medical examiner, even though the standard applied, as set forth above, was the same standard as followed for more than 30 years and most had gone to a neutral doctor pursuant to an agreement between F.E.C. and the Brotherhood of Railroad Trainmen. The Court held that time limits set forth in the collective bargaining agreement were immaterial;[20]

—in the instant case that the non-ops' agreements prohibit the general contracting out of work

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[17] Order On Rule To Show Cause, No. 64-40-CIV.-J, M. D. Fla., filed February 12, 1965.

[18] Order, No. 64-40-CIV.-J, M. D. Fla., filed February 15, 1965.

[19] Order, No. 64-239-CIV.-J, M. D. Fla., — F.Supp. —, 60 LRRM 2292 (1965).

[20] Order On Rule To Show Cause, No. 64-327-CIV.-J, M. D. Fla., filed February 28, 1966.

by the Railway even though the agreements are silent as to the contracting out of work and the Railway has always contracted out work when it did not have sufficient employees to do the work with its own forces; and

—in the instant case that F.E.C. is not permitted under the agreements to use supervisors to perform craftwork or to disregard temporarily craft or seniority district restrictions when sufficient personnel are not available to maintain contract structure even though the unions have repeatedly conceded that such practices do not violate the agreements.

Clearly the District Court is not the appropriate forum for the resolution of questions such as these. The proper forum for the resolution of such questions is the NRAB as this Court held in *Slocum* v. *Delaware, L. & W. R. Co., supra,* (339 U.S. at 243):

". . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. *The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon.* Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

A railroad labor organization which believes that a carrier is violating the collective bargaining agree-

ment during a strike (assuming the continuing vitality of the agreement) thus has *a complete and adequate remedy at law* before the body specially constituted to hear such complaints—the NRAB—and should not be permitted to invoke the equitable jurisdiction of the Federal courts.[21]

The fact that such infringement upon the exclusive jurisdiction of the NRAB is inevitable under the decision of the Court below illustrates a fundamental defect in its holding that the District Court should pass on whether proposed operating practices are "reasonably necessary" to keep the carrier in operation. The defect is this: there is no lawful authority for the exercise of such power by the District Court. It is a pure judicial invention whose ingeniousness may be admired but whose lack of basis in the statute is apparent.

If not founded on statute, the said authority must be based on the Court's general jurisdiction in equity. But, such general jurisdiction is not properly invoked in this case for the following reasons:

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[21] It must be thoroughly understood that the Railway is not asserting that, assuming the courts below properly ordered the reinstatement and maintenance of agreements during the strike, the District Court could not enforce its order if the Railway refused to reinstate and maintain its agreements. What the Railway does say is that disputes concerning the application and interpretation of those agreements are matters committed by the statute to the primary and exclusive jurisdiction of the NRAB and that the courts below had no jurisdiction to determine on the merits either whether the exceptions were to be permitted or whether, at least where a bona fide dispute was shown to exist, the application of the agreement by the Railway was right or wrong. This is precisely what the statute has specifically provided is reserved to the NRAB.

(1) The carrier's right to self-help after exhausting the Act's procedures is not a matter of equity, to be granted or withheld in the Court's discretion, but is a legal right whose exercise was contemplated by the Act itself.[22] It was not the intention of Congress in passing the Act to permit Federal courts, in their discretion, to limit the parties' right to self-help. See Point I., *supra,* pp. 14 *et seq.*

(2) Equitable relief is improperly granted where a complete and adequate remedy law exists, as it does in the instant case before the NRAB.

(3) In limiting the Railway's right to change operating conditions during a strike, the courts below have violated a basic principle of equity—mutuality. A court may not compel specific performance of a contract by one party when the other refuses to perform. As the Court of Appeals for the District of Columbia noted in *United Electrical, Radio & Machine Workers* v. *NLRB,* 223 F.2d 338 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 981 (1956), *rehearing denied,* 351 U.S. 915 (1956):

> "It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. . . . The walkout was a material breach . . . ." (223 F.2d at 341)

(4) In limiting the Railway's right to interpret and apply its agreements during a strike, subject to the right that any dispute growing out of its interpretation and application may under the agreements

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[22] The frequent characterization of the decision of the Court below as carving out an "exception" to the Act is thus entirely without merit.

and the statute be determined by the NRAB, the courts below have imposed on the Railway a limitation not imposed on any other carrier and in derogation of the statutory jurisdiction of the NRAB. The basic unfairness of permitting the District Court to supervise the operations of the strike-bound Railway, while permitting the striking labor organizations to conduct their strike and to disregard existing agreements with impunity, negates the idea that the courts have any general power in equity to prevent F.E.C. from operating as best it can during the strike.

Therefore, the decision of the Court below requiring F.E.C. to submit proposed changes in operations to the District Court in order to enable the Court to decide whether such changes are "reasonably necessary" to enable the railroad to operate during the strike is without basis in law, and merits reversal by this Honorable Court.

POINT III

THE UNITED STATES DOES NOT HAVE STANDING TO LITIGATE THE INSTANT CASE.

F.E.C. challenges the standing of the United States to litigate this case. The basic question posed is whether the United States should have the right to inject itself into any and all labor disputes which may arise under the Railway Labor Act, even though the flow of interstate commerce is not in fact interrupted. An inquiry into standing is particularly apropos when the position advanced by the United States is compared with the fundamental purpose of the Act—"To avoid any interruption to commence or to the operation of any carrier engaged therein . . . ." (45 U.S.C. § 151a (1)). The United States' claim, sustained by the Court below, that it has standing to litigate under the Com-

merce Clause of the United States Constitution (Article I, Section 8) ill accords with its position herein that failing capitulation of the carrier to the unions' demands, commerce must halt until the procedures of the Act are re-exhausted.

The United States contended in the Court below that it has a right of action under the Commerce Clause to intervene in a situation where the flow of interstate commerce is threatened. Upholding this claim, the Court below held that F.E.C.'s efforts to get back into operation, etc. were in fact a threat to the free flow of commerce (R. 908). The plain fact is that F.E.C.'s actions have never posed a "threat" to the flow of commerce and that a party's standing to litigate under the Commerce Clause may not be based upon hypothetical "threats", but must be founded on some substantial, actual breakdown of interstate commerce. *Re Debs*, 158 U.S. 564 (1895). Here, a major element of the case, the repeated claim and proof by the United States that F.E.C. was operating at virtually 100% of capacity,[23] belies the claimed threat. It demonstrates convincingly the fact that a threat to commerce was and is non-existent.[24] Unless a "threat" that the unions may be losing a strike is the equivalent of a "threat" to commerce, the United States has no standing herein.

Neither the temporary strike-required practices of F.E.C., which are the only matters now before the

[23] R. 148, 150, 250, 379-80, petition for certiorari p. 6 at n. 4; p. 18, n. 14.

[24] The District Court found that " . . . currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it" (R. 182).

Court, nor F.E.C.'s attempted permanent changes pursuant to Section 6 notices, which are no longer involved, were a threat to or an interruption of commerce. In fact, F.E.C.'s actions were completely consistent with the intention of the Railway Labor Act to maintain the flow of commerce. The situation here was and is a far cry from the major calamity involved in *Re Debs, supra*, in which the United States was found to have standing to seek an injunction so as to prevent a substantial part of commerce from coming to a halt. F.E.C. submits that *Debs*, upon which the United States bases its alleged standing under the Commerce Clause, involved a special, extraordinary situation *in which commerce was in fact interrupted*, and that the determination of the Court in that case is not controlling here. Moreover, the alleged "threat" to commerce in future strike situations unrelated to this case, upon which the United States relies so heavily, is equally unconvincing as authority for its purported right to litigate herein. When and if situations such as those in *Debs* arise, it will then be appropriate to consider whether there is a legitimate interest of the Government of the United States to be protected which might give the United States the requisite standing to sue. No such interest is involved here.

The United States also claimed standing under the Railway Labor Act to enforce the Act and to protect the jurisdiction of the NMB. The Court below apparently sustained this claim (R. 908), in spite of the fact that the United States was unable to cite one example in which an alleged violation of the mediation and conciliation procedures of the Act was held to give the United States the right to bring a civil action

for its enforcement. Nowhere in the Railway Labor Act can there be found any indication that the United States stands in the wings of every labor dispute with the right to take the part of one or the other of the parties at any time. The labor organizations involved here were and are fully capable of protecting whatever rights the Act accords them and, in conjunction with the NMB, have been zealous in enforcing its provisions. The suggestion of the Court below that the provisions of the Act (45 U.S.C. § 152, Tenth) "seems to authorize this type of proceeding by the United States" (R. 908) is clearly erroneous. The provision relied upon sanctions only criminal prosecutions for violations of the Act and has never before been invoked by the United States in support of a claimed right to institute civil proceedings.

The Court is respectfully urged to reverse the determination of the Court below that the United States has standing to seek injunctive relief against F.E.C. in this case.

CONCLUSION

The decision of the Court below works a major change in the right of employers to utilize self-help when confronted with a strike. This decision, and even more, the contention advanced by the United States herein, would operate to place carriers in a position of far graver disadvantage vis-a-vis their labor organizations than that occupied by any other employer in the United States. It is submitted that such a result was never intended by the Railway Labor Act, and that only by doing violence to the Act itself and to national labor policy can either the position of the courts below or that of the United States be

sustained. No purpose which Congress sought to serve would be accomplished by this misreading of the Railway Labor Act, and, indeed, the decision of the Court below can only be regarded as ignoring the most basic features of that Act; namely, the essentially voluntary nature of the procedures used to settle "major disputes" and the commission of disputes concerning interpretation and application of collective bargaining agreements to a body of experts and not to the courts. Finally, it is submitted that it ill serves the function of the United States Government to choose sides in a labor dispute and cast its lot with one or the other of the adversaries. The United States should never have brought this suit, and this Court should determine that it lacked standing to do so.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals must be reversed.

Respectfully submitted,

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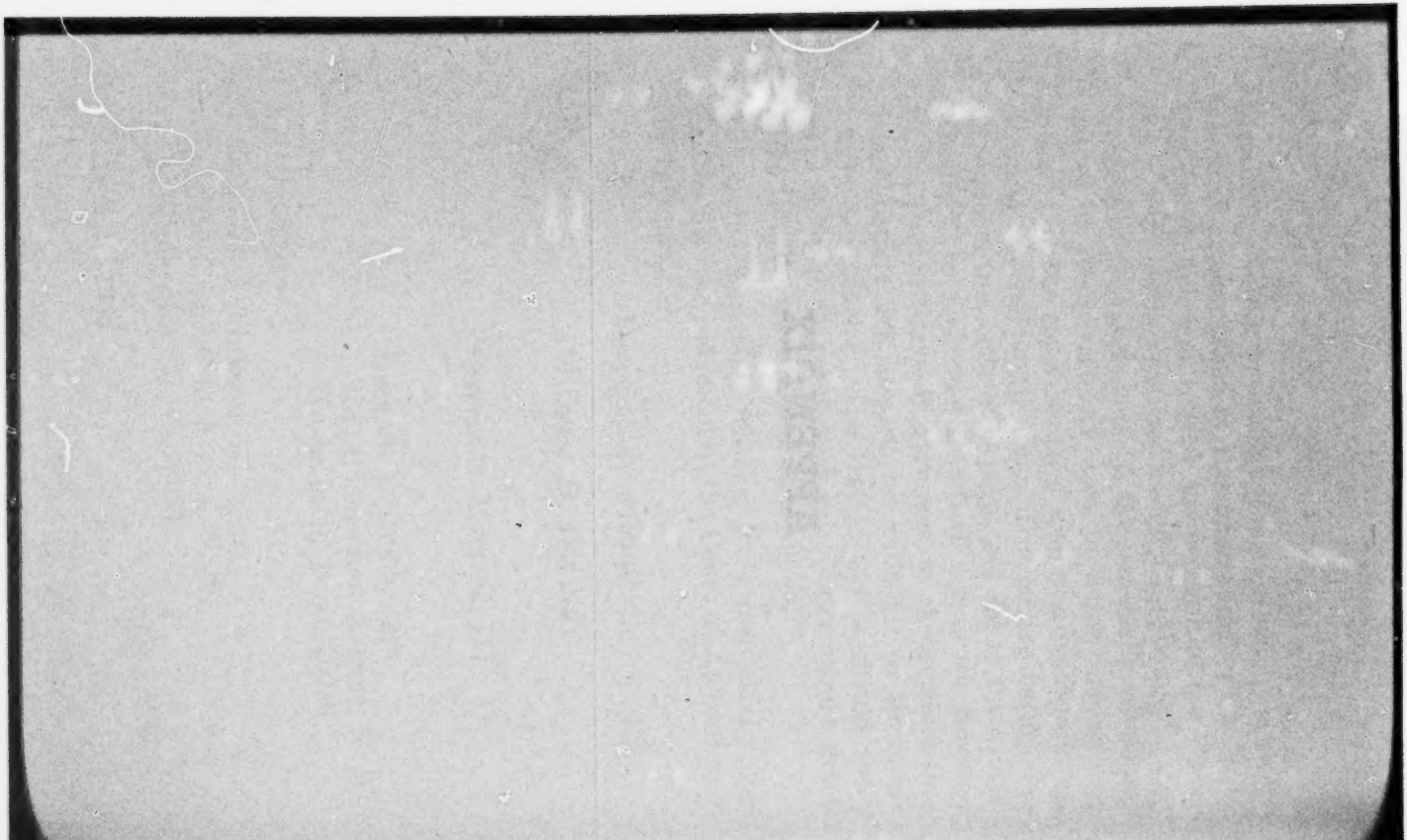
APPENDIX



APPENDIX

Railway Labor Act, 45 U.S.C. §§ 151-163

Sec. 2. The purposes of the Act are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (45 U.S.C. § 151a (1), (4), (5))

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (45 U.S.C. § 152, First)

. . .

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title. (45 U.S.C. § 152, Seventh)

Sec. 3. First. There is hereby established, a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

. . .

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, in-

cluding cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. (45 U.S.C. § 153, First (i))

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes of rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Broad may proffer its services in case any labor emergency is found by it to exist at any time.

In either event, the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this Section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have

failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose. (45 U.S.C. § 155, First)

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. (45 U.S.C. § 156)